

## SENATE BILL NO. 281

INTRODUCED BY WILLIAMS, WANZENRIED

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT AN AGENCY MAY IMPOSE CONDITIONS ON A PERMIT, PROPOSED AGENCY PROJECT, OR OTHER AUTHORITY TO ACT, BASED ON THE IMPACTS IDENTIFIED IN AN ENVIRONMENTAL REVIEW, IN ORDER TO PROTECT PUBLIC HEALTH AND SAFETY AND TO PROTECT FISH AND WILDLIFE; PROVIDING CONDITIONS WHEN MITIGATION MAY BE IMPOSED; AMENDING SECTION 75-1-201, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 75-1-201, MCA, is amended to read:

**"75-1-201. General directions -- environmental impact statements.** (1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) under this part, all agencies of the state, except the legislature and except as provided in subsection (2), shall:

(i) use a systematic, interdisciplinary approach that will ensure:

(A) the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment; and

(B) that in any environmental review that is not subject to subsection (1)(b)(iv), when an agency considers alternatives, the alternative analysis will be in compliance with the provisions of subsections (1)(b)(iv)(C)(I) through (1)(b)(iv)(C)(III) and, if requested by the project sponsor or if determined by the agency to be necessary, subsection (1)(b)(iv)(C)(IV);

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property, as provided in

1 subsection (1)(b)(iv)(D);

2 (iv) include in each recommendation or report on proposals for projects, programs, and other major  
3 actions of state government significantly affecting the quality of the human environment a detailed statement  
4 on:

5 (A) the environmental impact of the proposed action;

6 (B) any adverse environmental effects that cannot be avoided if the proposal is implemented;

7 (C) alternatives to the proposed action. An analysis of any alternative included in the environmental  
8 review must comply with the following criteria:

9 (I) any alternative proposed must be reasonable, in that the alternative must be achievable under  
10 current technology and the alternative must be economically feasible as determined solely by the economic  
11 viability for similar projects having similar conditions and physical locations and determined without regard to  
12 the economic strength of the specific project sponsor;

13 (II) the agency proposing the alternative shall consult with the project sponsor regarding any proposed  
14 alternative, and the agency shall give due weight and consideration to the project sponsor's comments regarding  
15 the proposed alternative;

16 (III) if the project sponsor believes that an alternative is not reasonable as provided in subsection  
17 (1)(b)(iv)(C)(I), the project sponsor may request a review by the appropriate board, if any, of the agency's  
18 determination regarding the reasonableness of the alternative. The appropriate board may, at its discretion,  
19 submit an advisory recommendation to the agency regarding the issue. The agency may not charge the project  
20 sponsor for any of its activities associated with any review under this section. The period of time between the  
21 request for a review and completion of a review under this subsection may not be included for the purposes of  
22 determining compliance with the time limits established for environmental review in 75-1-208.

23 (IV) the agency shall complete a meaningful no-action alternative analysis. The no-action alternative  
24 analysis must include the projected beneficial and adverse environmental, social, and economic impact of the  
25 project's noncompletion.

26 (D) any regulatory impacts on private property rights, including whether alternatives that reduce,  
27 minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this  
28 subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private  
29 property.

30 (E) the relationship between local short-term uses of the human environment and the maintenance and

1 enhancement of long-term productivity;

2 (F) any irreversible and irretrievable commitments of resources that would be involved in the proposed  
3 action if it is implemented; and

4 (G) the details of the beneficial aspects of the proposed project, both short-term and long-term, and the  
5 economic advantages and disadvantages of the proposal;

6 (v) in accordance with the criteria set forth in subsection (1)(b)(iv)(C), study, develop, and describe  
7 appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts  
8 concerning alternative uses of available resources;

9 (vi) recognize the national and long-range character of environmental problems and, when consistent  
10 with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to  
11 maximize national cooperation in anticipating and preventing a decline in the quality of the world environment;

12 (vii) make available to counties, municipalities, institutions, and individuals advice and information useful  
13 in restoring, maintaining, and enhancing the quality of the environment;

14 (viii) initiate and use ecological information in the planning and development of resource-oriented  
15 projects; and

16 (ix) assist the environmental quality council established by 5-16-101;

17 (c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state  
18 official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special  
19 expertise with respect to any environmental impact involved and with any local government, as defined in  
20 7-12-1103, that may be directly impacted by the project. The responsible state official shall also consult with and  
21 obtain comments from any state agency with respect to any regulation of private property involved. Copies of  
22 the statement and the comments and views of the appropriate state, federal, and local agencies that are  
23 authorized to develop and enforce environmental standards must be made available to the governor, the  
24 environmental quality council, and the public and must accompany the proposal through the existing agency  
25 review processes.

26 (d) a transfer of an ownership interest in a lease, permit, license, certificate, or other entitlement for use  
27 or permission to act by an agency, either singly or in combination with other state agencies, does not trigger  
28 review under subsection (1)(b)(iv) if there is not a material change in terms or conditions of the entitlement or  
29 unless otherwise provided by law.

30 (2) The department of public service regulation, in the exercise of its regulatory authority over rates and

charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

(3) (a) In any action challenging or seeking review of an agency's decision that a statement pursuant to subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person challenging the decision. Except as provided in subsection (3)(b), in a challenge to the adequacy of a statement, a court may not consider any issue relating to the adequacy or content of the agency's environmental review document or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.

(b) When new, material, and significant evidence or issues relating to the adequacy or content of the agency's environmental review document are presented to the district court that had not previously been presented to the agency for its consideration, the district court shall remand the new evidence or issue relating to the adequacy or content of the agency's environmental review document back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence or issue relating to the adequacy or content of the agency's environmental review document within the administrative record under review. Immaterial or insignificant evidence or issues relating to the adequacy or content of the agency's environmental review document may not be remanded to the agency. The district court shall review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review.

(4) To the extent that the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) are inconsistent with federal requirements, the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) do not apply to an environmental review that is being prepared by a state agency pursuant to this part and a federal agency pursuant to the National Environmental Policy Act or to an environmental review that is being prepared by a state agency to comply with the requirements of the National Environmental Policy Act.

(5) (a) (i) The Except as provided in subsection SUBSECTIONS (5)(a)(ii) AND (5)(A)(III), an agency may not withhold, deny, or impose conditions on any permit or other authority to act based on parts 1 through 3 of this chapter.

(ii) An agency may impose conditions on any permit or other authority to act based on LIKELY impacts identified in an environmental review prepared in accordance with parts 1 through 3 of this chapter in order to protect public health and safety and to protect fish and wildlife IF A PROJECT SPONSOR AND AN AGENCY HAVE NOT, PURSUANT TO SUBSECTION (5)(B), ADDRESSED THE IMPACTS IDENTIFIED IN THE ENVIRONMENTAL REVIEW. IN

1 IMPLEMENTING THIS SUBSECTION (5)(A)(II), AN AGENCY IS NOT REQUIRED TO IMPOSE CONDITIONS BASED ON IDENTIFIED  
2 IMPACTS, BUT THE AGENCY MAY NOT ARBITRARILY OR CAPRICIOUSLY DECLINE TO IMPOSE CONDITIONS.

3 (III) BEFORE AN AGENCY MAY IMPOSE CONDITIONS ON A PERMIT OR OTHER AUTHORITY TO ACT BASED ON  
4 SUBSECTION (5)(A)(II), THE AGENCY SHALL MAKE A WRITTEN FINDING BASED ON EVIDENCE IN THE AGENCY RECORD THAT  
5 A PROPOSED MITIGATION CONDITION:

6 (A) PROTECTS PUBLIC HEALTH AND SAFETY AND FISH AND WILDLIFE;

7 (B) MITIGATES AND IS RELEVANT TO AN IMPACT ON PUBLIC HEALTH AND SAFETY AND FISH AND WILDLIFE  
8 IDENTIFIED THROUGH THE PROCESS PROVIDED IN SUBSECTION (5)(A)(II); AND

9 (C) IS REASONABLE, ECONOMICALLY FEASIBLE, AND ACHIEVABLE USING CURRENT TECHNOLOGY.

10 (b) Nothing in this subsection (5) prevents a project sponsor and an agency from mutually developing  
11 measures that may, at the request of a project sponsor, be incorporated into a permit or other authority to act.

12 (c) ~~(i) Parts Except as provided in subsection~~ SUBSECTIONS (5)(C)(ii) AND (5)(C)(III), parts 1 through 3 of  
13 this chapter do not confer authority to an agency that is a project sponsor to modify a proposed project or action.

14 (ii) An agency that is a project sponsor may modify a proposed project based on LIKELY impacts identified  
15 in an environmental review prepared in accordance with parts 1 through 3 of this chapter in order to protect  
16 public health and safety and to protect fish and wildlife. IN IMPLEMENTING THIS SUBSECTION (5)(C)(II), AN AGENCY  
17 IS NOT REQUIRED TO IMPOSE CONDITIONS BASED ON IDENTIFIED IMPACTS, BUT THE AGENCY MAY NOT ARBITRARILY OR  
18 CAPRICIOUSLY DECLINE TO IMPOSE CONDITIONS.

19 (III) BEFORE AN AGENCY MAY IMPOSE A CONDITION ON A PERMIT OR OTHER AUTHORITY TO ACT BASED ON  
20 SUBSECTION (5)(C)(II), THE AGENCY SHALL MAKE A WRITTEN FINDING BASED ON EVIDENCE IN THE AGENCY RECORD THAT  
21 THE PROPOSED MITIGATION CONDITION:

22 (A) PROTECTS PUBLIC HEALTH AND SAFETY AND FISH AND WILDLIFE;

23 (B) MITIGATES AND IS RELEVANT TO IMPACTS ON PUBLIC HEALTH AND SAFETY AND FISH AND WILDLIFE IDENTIFIED  
24 THROUGH THE PROCESS PROVIDED IN SUBSECTION (5)(C)(II); AND

25 (C) IS REASONABLE, ECONOMICALLY FEASIBLE, AND ACHIEVABLE USING CURRENT TECHNOLOGY.

26 (6) (a) (i) A challenge to an agency action under this part may only be brought against a final agency  
27 action and may only be brought in district court or in federal court, whichever is appropriate.

28 (ii) Any action or proceeding challenging a final agency action alleging failure to comply with or  
29 inadequate compliance with a requirement under this part must be brought within 60 days of the action that is  
30 the subject of the challenge.

(iii) For an action taken by the board of land commissioners or the department of natural resources and conservation under Title 77, "final agency action" means the date that the board of land commissioners or the department of natural resources and conservation issues a final environmental review document under this part or the date that the board approves the action that is subject to this part, whichever is later.

(b) Any action or proceeding under subsection (6)(a)(ii) must take precedence over other cases or matters in the district court unless otherwise provided by law.

(7) The director of the agency responsible for the determination or recommendation shall endorse in writing any determination of significance made under subsection (1)(b)(iv) or any recommendation that a determination of significance be made.

(8) A project sponsor may request a review of the significance determination or recommendation made under subsection (7) by the appropriate board, if any. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. The period of time between the request for a review and completion of a review under this subsection may not be included for the purposes of determining compliance with the time limits established for environmental review in 75-1-208."

**NEW SECTION.** **Section 2. Effective date.** [This act] is effective on passage and approval.

- END -